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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE BOEING CORPORATION,
Petitioner,
v.
UNITED STATES EX REL. KELLY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ROCKWELL INTERNATIONAL CORPORATION, LITTON INDUSTRIES, INC., AND NORTHROP CORPORATION IN SUPPORT OF PETITIONER

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January 14, 1994

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Rockwell International Corporation, Litton Industries, Inc., and Northrop Corporation hereby move for leave to file the attached brief as *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief, but respondent has not consented.

Movants obtain a significant portion of their revenue under contracts with the United States government to supply various military products. Movants have been frequent targets of litigation under the False Claims Act brought by *qui tam* relators. Collectively, movants have been named as defendants in 25 cases brought by *qui tam* relators in which the government has declined to intervene. Movants have expended over $21.6 million

to defend themselves in such lawsuits. Movants expect that this costly barrage of litigation by *qui tam* relators will continue.

Because movants have been unwillingly involved in such a large number of lawsuits brought by *qui tam* relators, movants have unique insights into the practical problems engendered by the lack of Executive Branch control over such litigation. These insights will aid the Court in deciding whether to examine the constitutional issues presented by the petition.

In the proposed brief attached hereto, *amici* would explain why Executive Branch control over litigation instituted on behalf of the United States is a central requirement of the separation of powers. *Amici* further would explain the respects in which the Executive Branch lacks such control over *qui tam* litigation. In particular, *amici* would describe the lack of Executive Branch control over whether and where to initiate cases under the False Claims Act, the lack of control over the conduct of such cases, and the lack of control over their termination. *Amici* further would describe, based on their own experiences, how the absence of such control has adversely impacted the rights of private parties such as the *amici*, as well as the interests of the government.

Accordingly, movants respectfully request the Court to grant their motion for leave to file the attached brief as *amici curiae*.

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BRIEF OF ROCKWELL INTERNATIONAL CORPORATION, LITTON INDUSTRIES, INC., AND NORTHROP CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Rockwell International Corporation, Litton Industries, Inc., and Northrop Corporation each obtain a significant proportion of their revenue under contracts with the United States government to supply various military products. *Amici* collectively have been named as defendants in 25 lawsuits brought by *qui tam* relators under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, in which the government has declined to intervene.

Reductions in funding for military programs have forced *amici* to lay off significant numbers of employees. *Qui tam* lawsuits typically are brought by disgruntled employees or former employees. *Amici* anticipate that they will continue to be targeted as defendants in *qui tam* litigation unless this Court holds the *qui tam* provisions of the FCA unconstitutional.

SUMMARY OF ARGUMENT

Since the 1986 Amendments to the FCA made it easier and more lucrative for relators to pursue *qui tam* cases, such lawsuits have become a plague upon the defense industry. During those seven years, the *amici* filing this brief expended over $21.6 million in defending *qui tam* lawsuits in which the government did not intervene. By contrast, from 1986 through 1991 the federal treasury received a total of only $225,000 from *all* cases where the relator proceeded without the government. Prepared Statement of Assistant Attorney General Stuart M. Gerson, *Hearings before the Subcommittee on Civil and Constitutional Rights, Judiciary Committee, U.S. House of Representatives*, 102d Cong., 2d Sess., at 6 (April 1, 1992) ("Gerson Statement").

Qui tam litigation is brought in the name of the government, and seeks to recover claims and penalties that belong to the government, yet the government lacks effective instruments of control over such litigation. The *qui tam* lawsuits authorized by the FCA are unique in that the FCA leaves the government without the power either to control the conduct of counsel acting in its name or to decide whether, when and how to control the government's interest in its own claims.

When the claim asserted by the *qui tam* relator arises out of a contractual relationship between the government and a contractor, the relator's unbridled discretion in initiating and pursuing the action can drive a wedge between the government and its contracting partner. *Qui tam* lawsuits prevent the government as a contracting party from controlling when the government as a litigant (embodied in the *qui tam* relator) claims that the contract has been breached. Government contractors can no longer trust that the decision of a contracting officer with respect to a disputed issue will be final.

Although not every breach of contract should give rise to an FCA violation, there is no realistic protection against frivolous *qui tam* lawsuits. On the one hand, a relator has an enormous incentive to construct an argument that the contractor has committed some breach of the contract, that the contractor's claim for payment was therefore fraudulent, and that the relator should recover 30 percent of the contract price of the entire defense system. On the other hand, there is no effective deterrent even to baseless suits. Although the *qui tam* relator is theoretically subject to a claim for attorney's fees for bringing a frivolous action, this threat does not discourage relators with few assets, especially when compared to the huge potential upside of a fluke victory or the attactive prospect of a "strike suit" settlement.

The stakes in *qui tam* cases are enormous. Relators' suits commonly involve weapons programs for which the

defendant has been paid tens or hundreds of millions of dollars. Penalties under the FCA include treble damages, plus attorney's fees, plus between $5,000 and $10,000 per false claim. Relators have invented outlandish theories of what constitutes a "claim" for payment so as to inflate the penalties even beyond the amount of actual damages.

The prospects of multi-million dollar recoveries, the small downside risk of suing, and the lack of effective control by the Executive Branch have led to an intolerable state of affairs. Relators bring suits that the government would not bring, and pursue cases in a manner that the government would not pursue them. This harms both defendants, such as the *amici*, and the government itself.

The Court should consider the important constitutional issues raised by the Petition for Certiorari in this case now. Delay would only produce further burdensome expense for the defense industry, with little gain for the government.

ARGUMENT

I. THE UNCONSTITUTIONAL LACK OF EXECUTIVE CONTROL IN THE APPOINTMENT AND SUPERVISION OF *QUI TAM* LITIGATION HAS RESULTED IN GRAVE AND RECURRENT THREATS TO PRIVATE RIGHTS.

A. Executive Control Over The Initiation and Pursuit of Litigation Is Constitutionally Required.

The *qui tam* relator prosecutes a case in the name of, and on behalf of, the United States. The power to initiate and pursue litigation on behalf of the United States has always been understood to be a function reserved to the Executive Branch of our government. *See Buckley v. Valeo*, 424 U.S. 1, 128 (1976); *United States v. Nixon*, 418 U.S. 683, 693 (1974). The irreducible core of this principle is that suit cannot be maintained in the name of the United States contrary to the policies of the Executive Branch that manifest the President's duty to "take

Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

This is why the Court in *Morrison v. Olson* permitted Congress to impose some restrictions on that Executive prerogative *only* when the restrictions leave the Executive with "sufficient control" over the litigation "to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. 654, 696 (1988). The Court in *Morrison* applied this criterion in rejecting the separation of powers challenge to the Ethics in Government Act. Central to the Court's reasoning was its observation that the Attorney General ("AG") retained the following means of supervising and controlling the Independent Counsel ("IC"):

- The AG has the power to *initiate* an investigation.
- The AG's decision not to request the appointment of an IC is unreviewable, and no IC may be appointed unless the AG so requests.
- The AG has the power to define the *scope* of the investigation. The IC's jurisdiction is defined with reference to the facts submitted by the AG.
- The AG retains some control over the IC's *continuing activities.*
  - The IC must follow the policies of the Department of Justice ("DOJ") unless it is not possible to do so.
  - The AG can remove the IC for good cause.

See id.

These aspects of Executive control over the initiation and conduct of litigation on behalf of the United States are essential not only for the preservation of the powers of the President, but also for the protection of individual rights.

B. Essential Attributes Of Executive Control Are Absent Under The FCA.

The FCA delegates to self-appointed private parties the right to bring an enforcement action, a power which

Buckley reserved to the Executive Branch. The FCA deprives the Executive of the very powers of control that *Morrison* held to be essential to the constitutionality of the Ethics in Government Act:

- The *qui tam* relator is self-appointed. *See* 31 U.S.C. § 3730(b).
- The *qui tam* relator decides whether and when to initiate a case. *See id.*
- The *qui-tam* relator is not bound by the policies of the DOJ.
- The *qui tam* relator solely controls the scope of the case, and has every incentive to make the theory of the case as broad as possible. *See id.* and discussion at p. 11, *infra.*
- The *qui tam* relator may not be removed by the Attorney General or a court, even for good cause. *See* § 3730(c)(1)-(3).

Unlike the IC, therefore, the *qui tam* relator is free of any significant control by the Executive. The FCA establishes no controls to ensure that a *qui tam* relator accords private parties the protections that would result from Executive control. To the contrary, the *qui tam* relator is not politically accountable and has a direct and personal incentive to pursue cases under the FCA to the maximum extent possible. This regime is not only theoretically prone to abuse of private rights, but as shown in the following section, has actually resulted in such abuse.

C. The Practical Consequences Of The Lack Of Executive Control Over *Qui Tam* Litigation Under The FCA Pervade And Distort What Should Be Government Litigation.

1. *The* Qui Tam *Relator's Control Over The Initiation Of Litigation.*

The ability to decide whether and when to institute an action on behalf of the government is central to the Executive's authority to enforce the law. *Heckler v.*

Chaney, 470 U.S. 821, 832 (1985). The Ethics in Government Act preserves this power at the threshold due to the AG's unreviewable authority to decide whether to initiate a preliminary investigation and whether to apply for appointment of an IC. Even after the IC is appointed, the AG retains indirect control because the IC is required to follow DOJ enforcement guidelines.

Under the FCA, however, the *qui tam* relator has unrestrained authority to bring an action and the Executive cannot prevent the relator's institution of suit. *See* Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J. L. Pub. Pol. 701, 756 (1993) (Student Note). Under the FCA, the *qui tam* relator may file suit without advance authorization from or even notification to the government. 31 U.S.C. § 3730 (b)(1). *After* the complaint is filed, the *qui tam* relator must supply the government with a copy of the complaint and all material information and evidence the relator possesses. *Id.* § 3730(b)(2). At that point, the existence of the relator's suit is a *fait accompli*. The government's choices are limited to intervening to pursue the case, or declining to intervene and allowing the relator to pursue the case on his or her own. *Id.* § 3730(b)(4).

As a result, the *qui tam* relator can institute suit under the FCA in circumstances in which the Executive would decide that the national interest would be better served by not suing, or by suing at a later date. Some examples follow.

- *National Security.*

The relator's institution of suit may implicate national security interests. For example, the relator may allege that the defendant has falsely certified that certain performance criteria have been satisfied in connection with a classified weapons program. Resolution of that claim may require discovery and disclosure of the performance criteria in question, which could undermine the nation's interest in preserving the secrecy of such information. The government may have decided that the nation's secur-

ity is more important than the alleged fraud, particularly if the government's subsequent experience with the weapons system has demonstrated that the performance criteria have been satisfied or exceeded. The relator, however, is interested in his or her own financial gain, and is not concerned with these broader national interests. *Cf.* Caminker, *The Constitutionality of Qui Tam Actions,* 99 Yale L.J. 341, 365 & n.121 (1989).

• *Criminal Investigations.*

The relator's institution of suit may undermine an ongoing criminal investigation. The FCA allows the government to ask the court to stay discovery in the *qui tam* case for 60 days by showing that discovery would interfere with the government's investigation or prosecution of a criminal or civil matter. 31 U.S.C. § 3730(c)(4). In order to extend the 60-day stay, the government must show that it has pursued the investigation or proceedings with "reasonable diligence." *Id.* This standard was intended to restrict significantly the government's ability to delay the *qui tam* suit. *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 25 (1986) ("the court should carefully scrutinize any additional government requests for extensions by evaluating the government's progress with its criminal inquiry"). In several cases, district courts have refused to grant the government's requests for extensions sought to avoid interference with criminal investigations. *See Constitutionality of the Qui Tam Provisions of the False Claims Act,* 13 Opp. Legal Counsel 249, 1989 WL 418317, *9 (1989) ("Barr Op.").

The relator's pursuit of the case may alert potential criminal targets to the existence of a criminal investigation, and may disclose key information including the government's litigation strategy. *See id.*; Gerson Statement at 8. In addition, the existence of the *qui tam* suit may impair the government's ability to negotiate a comprehensive settlement of civil and criminal charges. *See id.*

• *Alternative Remedies.*

The relator's initiation of suit under the FCA may prevent or impair the government's ability to resolve the dispute with the defendant informally or on terms that are better suited to the nature of the conduct at issue.

The relator may claim, for example, that the defendant has incorporated product components different from those specified in the contract. In such a case, the relator could allege that the defendant made a claim for payment under the contract knowing that it had not complied with the precise terms of the contract, and therefore in violation of the FCA. In this way, the relator may attempt to turn even a minor breach of contract into a lawsuit claiming treble damages and $10,000-per-occurrence penalties. The fact that the substituted component actually works *better* than the one specified in the contract is of no import to the relator.

The government, however, may evaluate such a case quite differently. The government may recognize that the defendant has committed a technical breach of the contract, but may view that breach as minor. The government may determine that the government's interest would be better served by overlooking this breach, or by resolving the issue through informal discussions.[1] The government is likely to take this view when the basic intent of the contracting parties has been met, despite the defendant's technical breach. This is particularly true when the government has a strong interest in preserving a useful course of dealing with the defendant, as where the defendant is one of a limited number of parties qualified to supply specialized military products. *See* Barr Op. at *11.

Relators' pursuit of this type of case likely will adversely affect relations between the government and contractors. A contractor may be less likely to disclose to the govern-

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[1] *See* 5 U.S.C. §§ 571 *et seq.* (facilitating alternative dispute resolution for disputes involving government).

ment a mistake or the substitution of a component if the contractor knows that the approval of a government representative cannot be relied upon, and that a *qui tam* lawsuit could be brought. This result undermines the government's efforts to encourage informal working partnerships between the contracting agencies and defense contractors. Similarly, a government representative may be less likely to overlook or compromise a mistake or to allow a product substitution when that decision will be examined and second-guessed by a relator and a court after the fact. The result is that contractors and the government are likely to be less forthcoming and more rigid in their dealings, undermining the efficient management and administration of government contract programs. *See id.*

- *Prosecutorial Discretion.*

Relators initiate lawsuits under the FCA in cases where the government, in the exercise of prosecutorial discretion, would decline to bring suit. The relator may sue a deep-pocket company in a case in which the government would decline to sue because the company has fired the individual responsible for the wrongdoing, *see* Barr Op. at *9, or because the company has taken satisfactory corrective action including voluntary restitution to the government.

United Sta ex rel. Rohan v. Newbert, No. 92-55546 (9th Cir.), i e of many examples. In *Rohan*, a Litton employee embezzled funds from the Company. When the government alerted Litton to this conduct, Litton cooperated with the government agents in gathering information that was used in a successful criminal prosecution of the employee, and Litton made necessary accounting adjustments so the government did not bear the loss of the embezzled funds. The government chose to take no action against Litton, given that Litton was the victim of the embezzlement, had cooperated in the investigation, and had taken satisfactory corrective action. Another former Litton employee, however, brought a *qui tam*

claim against Litton based on each claim for reimbursement to the government that incorporated the embezzled amounts. Litton prevailed on a motion for summary judgment and on appeal, but only after expending a large amount of money and time defending a suit that never should have been brought. Had the government been able to exercise its prosecutorial discretion, the case would not have been filed.

Another factor influencing prosecutorial discretion is whether the facts of the case are well-suited to litigating novel legal principles. The government may decide that the facts frame the legal issue in a way that is likely to produce an unwelcome precedent, and therefore may choose to await another case in which to attempt to establish the principle. The relator, however, lacks this broad view. This problem is compounded by the fact that counsel for the relator may be less qualified to advocate these legal positions. Accordingly, relators' prerogative to institute suit may produce a body of law that undermines the government's continuing interests.

• *Claims the Relator Cannot Prove.*

A government prosecutor is to refrain from pursuing a case that is not supported by probable cause. ABA Model Rules of Professional Conduct, Rule 3.8.[2] A relator, however, does not operate under such constraint.

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[2] Although the ABA Rule specifically addresses criminal cases, it articulates considerations applicable to all enforcement actions brought in the name of the government, whether criminal or civil. Moreover, this Court has held that the extraordinarily harsh remedies authorized by the False Claims Act can constitute "penalties" under the Double Jeopardy Clause, *United States v. Halper*, 490 U.S. 435 (1989), and other courts similarly have determined that the Act should be viewed as a criminal or penal statute. *United States v. Bornstein*, 423 U.S. 303, 313 n.8 (1976) (False Claims Act must be construed as " 'the provisions of a criminal statute [and] [s]uch provisions must be carefully restricted' " (citation omitted)); *United States ex rel. Brensilber v. Bauch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942) (False Claims Act "is not only penal, but drastically penal"), *aff'd per curiam*, 320 U.S. 211 (1943).

A relator may file suit even when the prospects for success are small, because the recovery if that chance materializes is so large. Even if the relator knows that the case is weak, he or she may file suit in the hope of surviving motions and reaching a jury—because who knows what an inflamed jury might award? This is not, and should not be, the manner in which the government decides whether to bring an enforcement action under a penal statute such as the FCA. Moreover, there is no effective deterrent even to baseless suits by *qui tam* relators. The threat of sanctions for a frivolous action is not taken seriously by most relators, who have few assets with which to pay such an award. Compared to the tantalizing prospect of a huge recovery or even a nuisance settlement, the availability of such sanctions is not an effective check on baseless lawsuits.

In addition, relators frame the allegations of their complaints as broadly as possible in order to maximize potential recovery. *See* Gerson Statement at 18 (referring to the "uncomfortable number" of " 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever"). Such blunderbuss pleading is dangerous not only because it introduces baseless claims, but also because it encompasses (sometimes accidentally) potentially valid claims that the relator is unable to prove. Because any settlement or judgment will bind the government as a matter of *res judicata* even when the government does not intervene, relators' interest in expansive allegations can foreclose the government's future ability to pursue legitimate claims. *See* Barr Op. at *10.

Defendants typically win these baseless lawsuits, but at great cost in terms of money and time. Defendants still must hire counsel, investigate the facts, file motions, and sometimes engage in discovery. Even when the case is frivolous, the stakes are enormous, and defendants must take seriously any case brought under the FCA. As a result, an inordinate amount is spent on litigation that would be avoided if the government were in control of the initiation of lawsuits under the FCA. As mentioned

above, the *amici* filing this brief have collectively spent over $21.6 million on legal fees defending cases brought by *qui tam* relators in which the government has declined to intervene.

* * * *

The government could attempt to prevent relators from proceeding with some of these types of cases by intervening and requesting dismissal at the outset of the case. Under the FCA, however, the government must obtain court approval to dismiss. *Id.* § 3730(c)(2)(A). The relator can oppose the government's motion, leaving the court to decide which "representative" of the government should prevail. The relator can thereby force a case to go forward even when the government asks that it be dismissed.

This procedure, moreover, is not an effective substitute for the government's traditional prerogative to decide whether to *bring* suit. When the government declines to initiate suit because the evidence is ambiguous, because of countervailing government interests, or because of the cooperation of the potential defendant, it need not articulate or defend these reasons outside of the Executive Branch. It is quite a different matter for the government to *justify* in a public forum the dismissal of a case that already has been brought in its name. In order to request dismissal, the government must be willing to expend significant resources to engage in an adversary proceeding with a relator. It also must be willing to subject its prosecutorial reasoning to public scrutiny. Many in Congress and the press are of the view that every allegation of fraud on the government should be pursued with extreme vigor. These individuals are poised to attack the Executive upon the slightest indication that the pursuit of fraud claims is being cut off.

The government almost never moves to dismiss cases that it would not have brought in the exercise of its discretion. The government frequently has declined to intervene to request dismissal, even in cases where the

government has found "insufficient evidence" to support the allegations of the complaint.[3] Indeed, in the seven years since the amendments expanding the FCA, *amici* are aware of only one case in which the government has intervened and requested dismissal.[4]

2. *The* Qui Tam *Relator's Control Over The Forum.*

The FCA authorizes *qui tam* relators to bring suit in an appropriate District Court. 31 U.S.C. § 3730(b). In many instances, this undermines the statutory regime for resolution of government contract disputes by the Boards of Contract Appeals and the United States Court of Federal Claims. These are expert forums specifically designated to consider and decide issues of public contract interpretation. 41 U.S.C. §§ 606, 609. Appeal from both the Boards of Contract Appeals and from the Court of Federal Claims is to the Court of Appeals for the Federal Circuit. *Id.* § 607(g); 28 U.S.C. § 1295(a)(3). The statutory scheme is designed to ensure expertise in the adjudicative bodies and uniformity in the development of public contracts law.

The FCA, however, undermines this carefully designed statutory scheme by permitting relators to bypass the administrative mechanism and bring suit directly in District Court. The defendant and the government thereby are deprived of the benefit of the expertise of the Boards of Contract Appeals and the Court of Federal Claims. District Courts, which seldom deal with government contract disputes, are more likely to decide them in a manner at variance from the intentions and practices of the defendant and the government. In addition, District Courts in different jurisdictions may decide similar contract disputes in different ways, thus producing conflicting decision-

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[3] *See* DOJ Press Release No. 88-513 (regarding *United States ex rel. Stillwell v. Hughes Helicopter Co., Inc., et al.*)

[4] *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990). There, the government intervened to request dismissal only of a federal governmental agency and individuals acting in their official capacity.

making that is particularly inappropriate for government contracts.

If the *qui tam* provisions of the FCA did not exist, the Executive would weigh these considerations against the appropriateness of seeking recovery under the FCA in each case. The relator, however, has no interest in these competing factors, but desires only to obtain the greatest and fastest monetary recovery. Although the government may pursue administrative or other remedies while the *qui tam* action is pending, 31 U.S.C. § 3730 (c)(5), the statute does not require the *qui tam* suit to be stayed in the meantime.

3. *The* Qui Tam *Relator's Conduct Of The Case.*

Once the government declines to intervene in a case instituted by a *qui tam* relator under the FCA, the government is unable to control the relator's day-to-day management of the case. "If the government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). The lack of Executive control over the conduct of the litigation brought on behalf of the government produces serious problems for both the government and private defendants.

The relator is free to adopt legal positions in the litigation that are at odds with the positions that the Executive has taken or would take. For example, the relator may advocate an interpretation of a term of a contract between the defendant and the government that is contrary to the view taken by both the defendant and the government. *See, e.g., United States ex rel. McCoy v. Seaward Marine Services, Inc.*, 1992 U.S. App. Lexis 17979 at *10-11 (4th Cir. 1992). The defendant in such cases is required to finance the defense of a case brought on a theory that both contracting parties agree is unfounded.

Alternatively, the relator may put forth a view of the contract that the government has not considered. The relator's advocacy of such positions in the litigation (e.g.,

in responses to interrogatories or requests for admission) could be argued to *bind* the government with respect to the future administration of this and similar contracts. At a minimum, the defendant that continues to pursue a conflicting contractual interpretation is at peril of continuing liability. Moreover, the court or a jury will decide whether the relator's view of the meaning of the contract is correct. This resolution will bind the government and the contractor through the operation of *res judicata*. *See* S. Rep. 345, 99th Cong., 2d Sess. 27; Barr Op. at *8. Accordingly, private parties and the government may be required to modify the administration of the contract, even though that result was not intended and is not desired by either of the contracting parties, because of the relator's intermeddling.

The government lacks any effective means of controlling these abusive tactics by relators. The government's ability to file *amicus* briefs in support of defendants' positions is not an effective remedy. In order to participate in this manner, the government would be required to conduct a detailed review of all pleadings filed by every relator. Government attorneys would be required to attend all court hearings and trials at which relators' counsel might make arguments with which the government disagrees. The government simply lacks the resources to monitor *qui tam* litigation in this manner. Indeed, the lack of government resources was used in Congress to justify expansion of the *qui tam* provisions in 1986. Finally, even when the government does participate as *amicus*, the court may reject the views expressed by the Executive and adopt those advocated by the relator. This result would be avoided if the Executive and the defendant were the only parties to the litigation.

As a more extreme measure, the government could move to intervene if it recognizes that the relator's management of the case threatens the government's interests. Yet this course of action also is ineffective. The statute only authorizes the government to ask the court to limit the realtor's participation when it is repetitious, irrelevant,

or for purposes of harassment, as for example by limiting the number of witnesses, limiting the length of testimony, or limiting cross-examination. 31 U.S.C. § 3730(c)(2)(C). There is *no* provision permitting the government to ask the court to limit the *legal* arguments that the relator can assert.

Conceivably, the government could move to intervene and to dismiss the case, but this is even more unlikely than intervention and dismissal at the outset of the case. Moreover, when the government elects not to intervene at the outset of the litigation, the court may permit the government to intervene later "without limiting the status and rights of the person initiating the action." § 3730(c)(3). It has been argued that this provision means that the government cannot later intervene for the purpose of dismissing the action. *See* Blanch, *supra*, 16 Harv. J. L. Pub. Pol. at 708.

Relators' control over the management of litigation can produce adverse effects apart from the advocacy of legal positions contrary to those that are or would be asserted by the government. Relators often demand to obtain the government's investigative files and to interview or depose the government's investigators and other witnesses. Such conduct interferes with the government's investigative process, and diverts the valuable time and attention of government employees. *See* Barr Op. at *10. In addition, relators without required clearances may demand the production of classified documents, compromising the government's interest in preserving the secrecy of such material.[5]

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[5] For example, in *United States ex rel. Truong v. Northrop Corp.*, CV 88-967 MRP (C.D. Cal.), a *qui tam* case in which the government declined to intervene, the Court ordered Northrop to produce certain documents to the relator, including classified materials. Thereafter, an Air Force officer wrote to Northrop to advise of "Northrop's obligation under the contract and the law to not turn over classified information or documents." *See also United States ex rel. Grand v. Northrop*, No. C-1-91-222 (S.D. Ohio), where the government moved to intervene to ask for reconsideration of the

Relators have gone much further in their "discovery" efforts. Some employee-relators have stolen confidential documents from the defendant for use in the litigation (and claimed that such conduct was protected by the whistleblower provision of the FCA, 31 U.S.C. § 3730(h)). Such conduct in furtherance of an action "for the United States government," § 3730(b), would not be countenanced by the government.

4. *The* Qui Tam *Relator's Control Over The Termination Of Litigation.*

Qui tam relators' control over the termination of litigation under the FCA also reflects the unconstitutional evisceration of Executive control, and produces severe practical consequences for private defendants.

Neither the relator nor the government has the ability unilaterally to settle a case under the FCA. A defendant cannot settle the case with the relator alone. The government must be advised of the settlement, and may object to it. The FCA provides that a case brought by a relator under the FCA canont be dismissed without the consent of the court and the AG. 31 U.S.C. § 3730(b)(1). On the other hand, a defendant cannot settle with the government alone. A settlement between the defendant and the government is not effective unless the relator's objections are heard and the court finds that the settlement is "fair, adequate, and reasonable." 31 U.S.C. § 3730(c)(3)(B). Court approval, moreover, is not a foregone conclusion where the relator claims the settlement is inadequate. In *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *cert. denied*, 488 U.S. 901 (1988), for example, the court disapproved a settlement between the government and the defendant (which the relator had opposed) because it found the government's investigation to be inadequate. A few years and many litigation dollars

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Court's order that Northrop produce classified documents to the *qui tam* relator.

later, the case settled for the same figure. *See* Barr Op. at *10.[6]

As a practical matter, therefore, the structure of the FCA requires the defendant to negotiate a settlement with both the government *and* the relator. This is often extremely difficult, because the interests of the government and the relator directly conflict. The defendant typically is willing to pay a fixed sum to settle the case, but is indifferent as to how that sum is allocated. The government wishes to maximize recovery to the federal Treasury by minimizing the recovery of the relator, and therefore argues that the payment is mostly attributable to the government's claims. The relator, on the other hand, wishes to maximize his or her personal recovery, and therefore argues that a large portion of the payment is attributable to his or her "personal" claims, such as claims for workplace harassment under 31 U.S.C. § 3730 (h), or for attorney's fees.[7] The defendant is caught in this crossfire. The result is cases in which all parties agree on the sum the defendant should pay to settle, but the case cannot settle because the parties disagree on how it should be allocated. This problem is even more severe where the government asserts the right to veto a settlement between the defendant and the relator without actually intervening to take over the pursuit of the case. In that situation, neither the defendant, nor the relator,

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[6] The requirement of court approval of a settlement between the government and a private party is itself an unconstitutional restriction on Executive authority. The *qui tam* relator brings a claim on behalf of the government. The government, as the owner of the claim, should have the prerogative to settle it with the defendant. The FCA's restriction of the Executive's prerogative to settle its own claims creates an unprecedented judicial intrusion into the President's judgment. *See* Barr Op. at *10 & n.7.

[7] *See* Gerson Statement at 22 (reporting that, while the federal Treasury has received only $225,000 in connection with *qui tam* cases in which the DOJ has declined to intervene, private plaintiffs have structured settlements so that they and their attorneys have received, or have requested the DOJ to approve, more than $6.1 million in additional payments).

nor the government wish to pursue the case, but the case cannot settle.[8]

II. THE COURT SHOULD CONSIDER THESE IMPORTANT CONSTITUTIONAL QUESTIONS AT THIS TIME.

This case presents an unusual opportunity for the Court to address the important constitutional defects of the FCA. The Court may not soon have another such opportunity, because few *qui tam* cases reach the Courts of Appeals. Most cases brought by relators are won by defendants, or are settled before trial. *See* California Lawyer, December 1993, at 40 (comments of Stuart Gerson).

If the Court were to decline to grant the writ in this case, the delay in this Court's resolution of the constitutional issues would harm the public greatly. As noted above, there are significant costs in terms of money and time of defending cases brought by relators under the FCA. In contrast to these significant costs imposed by *qui tam* litigation under the FCA, the benefits to the federal Treasury are minimal. From 1986 through 1991, there were about 265 *qui tam* cases in which the government declined to intervene. *See* Gerson Statement at 19. The federal Treasury has received only $225,000 in all of these cases combined, or less than $1,000 per case on average. *Id.* at 6. This compares to $150 million recovered in *qui tam* cases in which the government has intervened, and over $1 billion in total fraud recoveries. *Id.* at 7.

The adverse effects resulting from the lack of Executive control over the initiation and conduct of litigation under the FCA are particularly severe in the wake of layoffs resulting from the restructuring of the defense industry. Former employees often are left without ready job prospects, and are easily tempted by the prospect of a big judgment against their former employers. Plaintiffs'

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[8] *See United States ex rel. Killingsworth v. Northrop Corp.*, No. 93-55863 (9th Cir.)

attorneys are ready to exploit this market. These attorneys are turning increasingly to the FCA as a lucrative adjunct to traditional wrongful termination claims, particularly in light of the restrictions imposed by State courts on tort recove y for employment terminations. In short, *qui tam* claims are booming in proportion to the contraction of the defense industry.

The Ninth Circuit's ruling in this case, unless reviewed by this Court, will definitively foreclose this constitutional challenge to *qui tam* litigation under the FCA in all cases brought in West Coast states. Because many defense contracto s (including each of the *amici*) have a major presence on the West Coast and have laid off many employees in those states. the effect of the Ninth Circuit's ruling is severe. It will require the defense industry to spend millions of dollars defending cases brought under an unconstitutional provision. These are cases that would not have been brought or pursued if the FCA permitted the degree of Executive control over this type of litigation that the Constitution requires.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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